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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 643

WILLMUT GAS & OIL COMPANY,
Petitioner,

vs.

EUGENE FLY, FORMER COLLECTOR OF INTERNAL REVENUE (HENRY FLY, Administrator of the Estate of Eugene Fly, Deceased, Substituted in the Place of Eugene Fly, Deceased),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILLMUT GAS & OIL COMPANY,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Willmut Gas & Oil Company, hereinafter referred to as "Petitioner" or "Willmut", prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit hereinafter set out in Section B-1 of this petition.

A.

OPINIONS BELOW

The opinion of the District Court Judge, rendered on September 5, 1961, is reported in 197 F. Supp. 19, annexed hereto as Appendix "A"; and the opinion of the Court of Appeals, rendered September 10, 1963, is reported in 322 F.2d 301, annexed hereto as Appendix "B".

B.

JURISDICTIONAL GROUNDS

1. The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was entered on September 10, 1963, and appears R. 54.

2. Whether there would be an application for a rehearing before this certiorari was applied for was considered and it was determined that such rehearing should not be sought, but certiorari asked as is here done.

3. Jurisdiction to review this order of the United States Court of Appeals for the Fifth Circuit is conferred upon this Honorable Court by Title 28, *U.S.C.*, Sec. 1254(1) and Sec. 2101(c), Appendix "C" and Appendix "D".

C.

QUESTIONS PRESENTED

I. When Congress made the provision in Section 732(a): "the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax under this subchapter", did not Congress intend merely to afford alleged taxpayer a supplemental method to test liability before incurring the hazards incident to paying the tax and suing in the District Court?

II. When, as to Petitioner's *indebitatus assumpsit* in the District Court against Fly, the wrongdoer, validly pending on its merits, the Court held that Congress had "specified an exclusive remedy" against the United States in the Tax Court, and "taxpayer has no election to determine where it will seek relief" and dismissed so that no recourse whatsoever remained and its $18,575.08 taken, has not manifest constitutional wrong been wrought and Petitioner deprived of property without due process under the Fifth Amendment?

III. Can Congress forfeit Petitioner's constitutional right in an Article III court demandable at common law for not accepting the finding of an executive agency wherefrom no appeal is, and whereover this Court has no power of constitutional rectification when Petitioner specifically refused the tender of the executive clemency alleged to have been existent therein?

IV. Appropriate judgment here.

D.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

I. United States Constitution:

(1) Article I, Section VIII, Cl. 9:

> "The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court."

(2) Article III, Section 1:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

(3) Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(4) Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

(5) Ninth Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(6) Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

II. Title 26, U.S.C.A. (1939):

(1) Section 732, Appendix "E", but subsection (a) provides in part:

"(a) If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b) (1) (H), (I), (J), or (K), section 721, or section 722, relating

to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax under this subchapter. * * *."

(2) Section 3770(b):

"The Commissioner, subject to regulations prescribed by the Secretary, is authorized to repay—

"(1) To any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

"(2) All damages and costs recovered against any collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty."

(3) Section 3772, Appendix "F".

III. Title 28, U.S.C.A.

(1) Section 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

(2) Section 1332:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States: * * *"

(3) Section 1346:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *."

(4) Section 2006:

"Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

"(1) probable cause existed; or

"(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

"When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury."

E.

STATEMENT OF THE CASE

Willmut paid Federal income and excess profits taxes for 1944 and 1945. Upon audit, additional taxes were demanded and paid under protest and suit for the tortious exaction thereof instituted January 6, 1954, in the United States District Court against Eugene Fly, formerly Collector of Internal Revenue (Henry Fly, Administrator, of

the Estate of Eugene Fly, Deceased, substituted in the place of Eugene Fly, Deceased), wherein Willmut averred, R. 2 (Appendix "G"):

> "2. Jurisdiction of this Court arises by reason of diverse citizenship, the amount in controversy, exclusive of interest and costs, is in excess of $3,000, and this demand is based upon the statutes of the United States pertaining to the internal revenue laws, namely: Internal Revenue Code, whereunder plaintiff claims the right to recover from defendant under a proper interpretation of said statute by the Court of the facts incident; which are not in dispute."

Likewise, Willmut instituted *indebitatus assumpsit* as a second count, R. 7. Thereupon Fly interposed this motion, R. 10. (Appendix "H"):

> "1. This Court is without jurisdiction of the subject matter and of this action under the provisions of Section 732(c) of the Internal Revenue Code.
>
> "2. The complaint fails to state a claim upon which relief can be granted by this Court."

Having been continued to the merits, respondent answered, repeating the no jurisdiction averment. At the hearing, the Court considered only jurisdiction under Section 732(c)—never the merits. Jurisdiction was assailed *in limine;* however, the District Judge said, R. 37:

> "* * * Paragraph (c), Sec. 732, seems unquestionably dispositive of the matter of the jurisdiction of this Court * * * *"

And then concluded, R. 38:

> "* * * The merits of this case are not reached and the judgment to be entered here will not reflect any views on the merits of this case. * * *."

The suit was dismissed. Upon appeal, affirmance was had, the Court of Appeals concisely concluding, R. 53:

> "In this case the taxpayer has no election to determine where it will seek relief; Congress has specified an exclusive remedy. * * *."

And the Court of Appeals then went further and most improperly assumed to decide, R. 53:

> "* * * Congress has provided for a hearing and review in the Tax Court. Due process requires no more. There is no constitutional guaranty of a hearing in an Article III court. * * *"

Willmut's return was lawfully made, but contrary to its constitutional rights, the amount was augmented by $18,575.08, and thereasto this controversy is. If this Court sustains the District Court's jurisdiction, in that Court, Willmut submits with absolute confidence, full rectification can be wrought on the merits.

F.

ARGUMENT

POINT I.

When Congress Made the Provision in Section 732(a): "The Taxpayer May File a Petition with the Tax Court of the United States for a Redetermination of the Tax under This Subchapter", Did Not Congress Intend Merely to Afford Alleged Taxpayer a Supplemental Method to Test Liability Before Incurring the Hazards Incident to Paying the Tax and Suing in the District Court?

With the utmost deference, the two Judges who decided this cause fundamentally assumed, without citation, to overrule certain decisions of this Court and to decide a basic constitutional question. Petitioner had never elected to file a petition in the Tax Court. That assumed to be done by Section 732(c) as to the second war tax act had precedently been effectively accomplished by Sections 327

and 328 under the first war tax act. The Tax Court is an Article I court, if a court at all, thus created expressly by Congress, Section 7441, 26 *U.S.C.A.*:

> "The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. * * *."

Compare *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 73 L.ed. 918; *Flora* v. *United States*, 357 U.S. 63, L.ed. 2d 1165; 362 U.S. 145, 4 L.ed. 2d 623.

As to the right of petitioner to sue Fly individually, the same was crystallized and most potently expressed by Mr. Justice Frankfurter in *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 86 L.ed. 1455; and with the merits thus assured, the form of procedure was definitely and appropriately determined by *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 558, 72 L.ed. 985, whereunder the relief was conclusively adjudged here to be the exercise of executive clemency rendered requisite by the imposition of the war tax, the Court saying:

> "Sections 327 and 328 were intended to broaden the powers of relief first conferred by Sec. 210 of the War Revenue Act of (October 3) 1917, chap. 63, 40 Stat. at L. 300, 307. It was 'believed necessary to provide a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality.' Senate Report, 65th Cong. 3d Sess. No. 617, p. 14. * * *."

And being thus executive and not judicial, no appeal lay for reasons so accurately therein stated. That this was the true nature of that done was reaffirmed by *Lynch* v. *United States*, 292 U.S. 571, 577, 78 L.ed 1434, wherein solely in virtue of this inherent nature did this Court allow this provision to stand, saying:

"* * * Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. * * *."

In the Record herein, it was specifically agreed, Stipulation, p. 34:

"10. Should it be determined that the plaintiff is entitled to a recovery in this action, said recovery shall be computed by the Internal Revenue Service. If the parties are unable to agree to this computation the matter may be brought before the Court for a determination."

In *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 721, 73 L.ed. 918, Mr. Chief Justice Taft declared:

"The Board of Tax Appeals, established by Sec. 900 of the Revenue Act of (June 2) 1924, title IX. chap. 234, 43 Stat. at L. 253, 336, U.S.C. title 26, Sec. 1211, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment. The board's duty under the Act of 1924 was to hear, consider and decide whether deficiencies reported by the Commissioner were right."

In *Flora* v. *United States*, 362 U.S. 145, 160, 4 L.ed. 2d 623, the Chief Justice said as to the *Old Colony Trust Company* case, *supra*:

"* * * It is true, of course, that the Board of Tax Appeals procedure has the effect of staying collection, and it may well be that Congress so provided in

order to alleviate hardships caused by the long-standing bar against suits to enjoin the collection of taxes. But it is a considerable leap to the further conclusion that amelioration of the hardship of pre-litigation payment as a jurisdictional requirement was not another important motivation for Congress' action.[23]

* * *

"23. In Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 73 L. ed. 918, 924, 49 S. Ct. 499, this Court expressed the view that the Board 'was created by Congress to provide taxpayers an opportunity to secure an independent review . . . in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment.'"

And further, the Chief Justice said, 362 U.S. 162:

"* * * It is interesting to note in this connection that bills to permit the same type of prepayment litigation in the District Courts as is possible in the Tax Court have been introduced several times, but none has ever been adopted.

"In sum, even assuming that one purpose of Congress in establishing the Board was to permit taxpayers to avoid distraint, it seems evident that another purpose was to furnish a forum where full payment of the assessment would not be a condition precedent to suit. The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner."

Petitioner paid the unlawful tax with interest and that act by Fly became history before Petitioner sought rectification in the District Court. The hardship of prepayment has been vigorously presented and the rights thereunder by this Court in *Flora* v. *United States*, 357 U.S. 63, 72, 2 L.ed. 2d 1165, 1171.

"When Congress created the Board of Tax Appeals in 1924, it demonstrated a clear understanding that refund suits could only be maintained upon full payment of the tax alleged to be due. The House Committee proposing the bill explained its purpose as follows:

"'The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedies by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.'

"Petitioner argues that the 'hardship' the Board of Tax Appeals was created to alleviate was not the taxpayer's inability to sue without paying the whole tax—for petitioner erroneously concludes that the 1921 Amendment conferred that right—but the Government's power to collect the balance due while a refund suit was in progress. But the Committee Report quoted above clearly demonstrates that the hardship about which the Congress was concerned was the hardship of prelitigation payment, not post-litiga-

tion collection. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 73 L.ed. 918, 924, 49 S. Ct. 499."

The shocking anomaly of the opinion in the Court of Appeals is that after Petitioner had paid the tax to the Government as claimed, with interest, and was not in default, and Fly, without right or authority of law, had done the deed of shame—collected that whereto the Government had not a scintilla of justice—the Court made the provision authorizing a non-judicial proceeding before the tax agency a complete forfeiture of that constitutionally possessed.

With deference, how this supplemental remedy was tortured into a death warrant of a constitutional right is not apparent and is solely remediable here. Therefore the Court of Appeals made no apposite citations, the cases being distinguished in Appendix "I" hereto. If the opinion be not expunged, with deference, it will be, as termed by this Court, a springe and thereby others misled to their disherison. If Section 732(c) is construed as it should be, as a supplemental remedy to be pursued under voluntary election, it will be harmonious. There may be the necessity for a third exercise of the war tax imposition and fundamental wrong may be wrought to our tax system if this be not expunged as it should be. In no other Circuit, with deference, does this anomaly exist. Uniformity must be guaranteed here; but if this Court does not, with deference, follow, then:

POINT II.

When, As to Petitioner's Indebitatus Assumpsit in the District Court Against Fly, the Wrongdoer, Validly Pending on Its Merits, the Court Held That Congress Had "Specified an Exclusive Remedy" Against the United States in the Tax Court, and "Taxpayer Has No Election to Determine Where It Will Seek Relief" and Dismissed so That No Recourse Whatsoever Remained and Its $18,575.08 Taken, Has Not Manifest Constitutional Wrong Been Wrought and Petitioner Deprived of Property Without Due Process under the Fifth Amendment?

Willmut, having been deprived of $18,575.08 by Eugene Fly, who pretended to have authority for this exaction from the United States, sued Fly in the District Court, and when it thus did, it carefully examined the jurisdiction of the District Court under Sections 1331, 1332 and 1346, 28 *U.S.C.A.*, and concluded that jurisdiction existed in the District Court in virtue of the decisions of this Court beginning with *Elliott* v. *Swartwout*, 10 Pet. 137, 9 L.ed. 373; *Cary* v. *Curtis*, 3 How. 233, 11 L.ed. 576, both majority and minority opinions, especially the dissent of Mr. Justice Story; *Philadelphia* v. *Collector*, 5 Wall. 720, 18 L.ed. 614; *Sage* v. *United States*, 250 U.S. 33, 63 L.ed. 628; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 77 L.ed. 1265; *United States* v. *Kales*, 314 U.S. 186, 86 L.ed. 132; *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 86 L.ed. 1455; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 93 L.ed 1628; and since the District Court suit was brought, that whereon we relied for our action, with deference, has been confirmed certainly by dictum by this Court in *Flora* v. *United States*, 357 U.S. 63, 2 L.ed. 2d 1165. Therein Mr. Chief Justice Warren said, p. 75:

"It is suggested that a part-payment remedy is necessary for the benefit of a taxpayer too poor to pay the full amount of the tax. Such an individual is free to litigate in the Tax Court without any advance payment. Where the time to petition that court has expired, or where for some other reason a suit in the District Court seems more desirable, the requirement of full payment may in some instances work a hardship. But since any hardship would grow out of an opinion whose effect Congress in successive statutory revisions has made no attempt to alter, if any amelioration is required it is now a matter for Congress, not this Court."

And on reargument, *Flora v. United States*, 362 U.S. 145, 185, 4 L.ed. 2d 623, 645, Mr. Justice Whittaker, dissenting, said:

"Judicial proceedings for refund of United States taxes in federal courts originated, without express statutory authority, by suits against Collectors (now District Directors), before the United States had made itself amenable to suit. Elliott v. Swartwout, (U.S.) 10 Pet. 137, 9 L.ed. 373 (1836), recognized the existence of a right of action against a Collector of Customs for refund of duties illegally assessed and paid under protest. The doctrine of the action, based upon the common-law count of assumpsit for money had and received, was thus formulated: '(W)here money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal; if he has had notice not to pay it over.' 10 Pet., at 158. As a result of that case, Collectors of Customs who collected monies paid under protest, resorted to the practice of withholding such amounts from the Government as indemnity against loss should a refund suit against them be successful. See Plumb, Tax Refund Suits Against Collectors of Internal Revenue, 60 Harv. L. Rev. 685, 688-689. That practice led to abuses and facilitated peculation under the guise of self-protec-

tion. Because of the wholesale frauds of Swartwout, the New York Collector (see Swartwout, 18 Dictionary of American Biography (1936), 238-249), Congress, in 1839, expressly prohibited such withholding by Customs Collectors pending the possibility, or the result, of litigation against them. Act of Mar. 3, 1839, ch. 82, Sec. 2, 5 Stat. 348. Six years later, in 1845, this Court held that this Act, by reducing the Collector to 'the mere bearer of those sums (duties) to the Treasury,' *terminated the right of action against the Collector for refund, for, being deprived of the right to withhold payment to his principal, he was no longer under an implied promise to refund illegally collected duties to the taxpayer.* Cary v. Curtis, (U.S.) 3 How. 236, 241, 11 L.ed. 576, 579 (1845).

"This created the intolerable condition of denying to taxpayers any remedy whatever in the District Courts to recover amounts illegally assessed and collected, and—doubtless also influenced by the vigorous dissents of Mr. Justice Story and Mr. Justice McLean in that case—induced Congress to pass the Act of Feb. 26, 1845, ch. 22, 5 Stat. 727, *which was the first statute expressly giving taxpayers the right to sue for refund of taxes illegally collected. That Act, in substance, provided that nothing contained in the Act of Mar. 3, 1839 (ch. 82, Sec. 2, 5 Stat. 348), should be construed to take away or impair the right of any person who had paid duties under protest to any Collector of Customs, which were not lawfully 'payable in part or in whole,' to maintain an action at law against the Collector to recover such amounts.* It is evident that Congress, by that statute, was merely concerned to reverse the consequences of Cary v. Curtis (U.S.) supra, and to restore the right of action against Collectors which had originally been sustained in Elliott v. Swartwout, (U.S.) supra. *Neither the terms of that statute nor such knowledge as is available of its history reveals any limiting purpose except that the protest be made in writing before or at the time of the payment.*

"While that statute, the Act of Feb. 26, 1845, referred only to refunds of customs duties, this Court held in Philadelphia v. Collector (Philadelphia v. Diekl), (U.S.) 5 Wall. 720, 730-733, 18 L. ed. 614, 616, 617 (1867), that taxpayers had the same right of action against Collectors to recover illegally collected internal revenue taxes.

"The United States was first made directly suable in District Courts for tax refunds by the Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, commonly known as the Tucker Act, which conferred jurisdiction on the District Courts over 'All claims (against the United States, not exceeding $1,000) founded upon the Constitution of the United States or any law of Congress, . . . or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.' This jurisdictional grant was held, in United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 59 L. ed. 825, 35 S. Ct. 399 (1915), to *have included jurisdiction over suits for tax refunds*, as claims 'founded upon' the internal revenue laws. *The general language of that Act, the Tucker Act, was most evidently not intended to, and did not, impose any new conditions upon the pre-existing right to sue (the Collector) for the refund of taxes illegally collected*, save for a monetary limit of $1,000, which was increased to $10,000 in 1911.

"The gist of Sec. 1346(a), with which we are now concerned, first appeared in the jurisdictional statute in 1921, as part of the Revenue Act of 1921, ch. 136, Sec. 1310(c), 42 Stat. 311. The reason for its appearance is entirely unrelated to the question whether full payment of an assessment is a condition precedent to a suit for refund. Under the Tucker Act, as it stood in 1921, the United States could not be sued in

> a District Court for a tax refund of more than $10,000. Taxpayers with larger claims could pursue either their old remedy—which continued to be available and is today—against the Collector in the District Courts or their remedy against the United States in the Court of Claims. But, the right of suit against the Collector was impaired in 1921 by the decision in Smietanka v. Indiana Steel Co., 257 U.S. 1, 66 L.ed. 99, 42 S. Ct. 1 (1921). It held that such actions against the Collector were personal in character and not maintainable against his successor in office. Hence, if the Collector had died or ceased to be in office, a taxpayer with a refund claim of more than $10,000 had no remedy in a District Court. The portion of the Revenue Act of 1921 that is now embodied in Sec. 1346(a) was an amendment of the Tucker Act and was designed to preserve to taxpayers with claims of more than $10,000 a District Court remedy, even where the Collector had died or was out of office, by suit against the United States. The legislative history makes this purpose plain." (Emphasis ours unless otherwise noted.)

Exoterically, it is respectfully submitted that there is no overruling by the Chief Justice of that line of cases beginning with *Elliott* v. *Swartwout*, 10 Pet. 137, 9 L.ed. 373, and coming down through *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 86 L.ed. 1455.

Notwithstanding the foregoing, the Court of Appeals, for the first time and, we submit, without precedent precedent has declared, R. 53:

> "In this case the taxpayer has no election to determine where it will seek relief; Congress has specified an exclusive remedy. * * *."

Under *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 86 L.ed. 1455, quoted *infra*, congressional action was a condition precedent to replacing the common law as to

indebitatus assumpsit against an individual. As was said by the Chief Justice in *Flora* v. *United States*, 362 U.S. 145, 157, 4 L.ed. 2d 623:

> "We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws. From these related statutes, all of which were passed after 1921, it is apparent that Congress has several times acted upon the assumption that Sec. 1346(a)(1) requires full payment before suit. * * *."

1. The statute whereunder the Court of Appeals wrought this monstrous change was simple and clear, and expressly provided, Sec. 732(a): "the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax under this subchapter."

Certainly the Court of Appeals was definitely advised of these decisions and of the statutes of the United States, including the Tucker Act, and it is said that Congress intended to make the Tax Court jurisdiction—when it was only an agency and an Article I court—exclusive as to (a) the State courts and (b) the Article III courts whereasto it was expressly said in a dissent, but, with deference, announcing a rule wherein total concurrence had been, by Mr. Justice Douglas in *Glidden* v. *Zdanok*, 370 U.S. 530, 600, 8 L.ed. 2d 671, 716:

> "The judicial functions exercised by Article 3 courts cannot be performed by Congress nor delegated to agencies under its supervision and control. * * *."

Compare Section 7441, 26 *U.S.C.A.* quoted, *supra*. Therefore, under *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 558, 72 L.ed. 985, quoted *supra*, the jurisdiction of the Tax Court was specifically limited. Administrative

clemency existed but not judicial admeasurement of the Constitution. See *Lynch* v. *United States*, 292 U.S. 571, 78 L.ed. 1434, quoted *supra*.

Since Petitioner consciously sued in the District Court and forewent the Tax Court, it is requisite, with deference, that these simple declarations—that is, "redetermination of the tax", "may", and that which the Tax Court could enter was not judicial but strictly executive clemency whereasto appeal was not—renders it absolutely requisite that this statute so construed wrongfully by the Court of Appeals be construed so that its constitutionality may be preserved. Compare *Rosenberg* v. *Fleuti*, 374 U.S. 449, 10 L.ed. 2d 1000, 1002, wherein this Court said:

> "* * * Upon consideration of the case, however, and in accordance with the long-established principle that 'we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,' * * * we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether Sec. 212(a)(4) is constitutional as applied to respondent."

See also *United States* v. *Witkovich*, 353 U.S. 194, 1 L.ed. 2d 765.

Under Article III of the Constitution, therefore, having selected a judicial administration wherein constitutional revision here might be had, Petitioner is not to be thereof, over its protest, deprived by "may", "redetermination of tax". It will not accept clemency from the executive which Petitioner has never claimed. In *Burdick* v. *United States*, 236 U.S. 79, 94, 59 L.ed. 476, 481, Mr. Justice McKenna said:

> "* * * Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Bur-

dick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action was personal. * * * ".

2. Repeals by implication not favored.

This war profits tax, with its complexities, has long since disappeared and that here at issue is, did its enactment destroy the rights (a) under the common law and (b) under the tax act? *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 76 L.ed. 971, approved in 50 *Am. Jur.*, "Statutes", Sec. 542, p. 548.

3. "Redetermination of the tax" and "may".

Referring to substantially that which is here at issue, the great Judge Learned Hand in *American Coast Line* v. *Commissioner of Internal Revenue*, C.A. 2, 159 F.2d 665, 668, specifically said:

> " * * * We do not so regard Sec. 722; on the contrary it was a favor; it presupposed that, even after taking into account the ameliatory conditions of Sec. 721, the tax was due unless ex gratia the blow was softened; it was a tempering of the wind to the shorn lamb. When Congress imposed as a condition upon such a favor, and expressly prescribed that the recipient must not be in default as to what it acknowledged to be due, we can hardly believe that it meant to relieve those of the same condition who had wrongly, even though honestly, failed to acknowledge what in fact was due, merely because their liability had not been finally determined on an appeal. * * * "

Note as controlling the decision of this Court in *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 72 L.ed. 985, where after remarking that the record that was required was not for the protection of the taxpayer but of

the Commissioner, and further that the Commissioner might as of right refuse, the jurisdiction exercised thereasto was not in any sense judicial, the Court thereasto remarking, 277 U.S. 561:

> "* * * Here, the considerations which demand special assessment under Sec. 327(d), and those which govern its computation in all cases, are facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information.
>
> "The jurisdiction of the court of claims, if any, rests on statutory provisions which long antedate the Revenue Act of 1918. Its jurisdiction over suits to recover taxes is based on the clause in the original Act of February 24, 1855, chap. 122, 10 Stat. at L. 612, empowering it to determine 'all claims founded upon any law of Congress.' * * *. But we have held that the court of claims is without jurisdiction where the statute creating the claim expressly refers it for final determination to an executive department. United States v. Babcock, 250 U.S. 328, 331, 63 L.ed. 1011, 1012, 39 Sup. Ct. Rep. 464. And that it is equally without jurisdiction where from an examination of all the terms of the statute it appears that Congress intended to vest final authority in an administrative agency. * * *. Long ago Congress conferred final authority upon such an agency in the enforcement of the appraisal provisions by which the amounts payable under the customs laws are determined. * * *.
>
> "Moreover, whatever jurisdiction is possessed by the court of claims to review determinations under Secs. 327, and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under Sec. 24(20) of the Judicial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review

by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote, that equality in the application of the revenue law which Secs. 327 and 328 were designed to ensure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities."

But that thereasto there may be judicial review is specifically prescribed by this Court in the preceding paragraph, 277 U.S. 560:

"It is true that where the Commissioner's action is reviewable judicially, his findings of fact in making an assessment, as distinguished from his determinations involving administrative discretion, constitute only prima facie evidence; and that, in cases arising under the internal revenue laws, such findings are commonly reviewable by courts in appropriate proceedings in which the facts become an issue. United States v. Rindskopf, 105 U.S. 418, 422, 26 L.ed. 1131, 1135; Wickwire v. Reinecke, 275 U.S. 101, 105, ante. 184, 48 Sup. Ct. Rep. 43. It is also true that in reviewing the Commissioners' findings on such matters as value, compare Castner, Curran & Bullitt v. Lederer, (D.C.) 275 Fed. 221; Little Cahaba Coal Co. v. United States, (D.C.) 15 F. 2d 863; allowances for depreciation, compare Cohen v. Lowe, (D.C.) 234 Fed. 474; Camp Bird v. Howbert, (C.C.A. 8th) 262 Fed. 114; or the accuracy with which a taxpayer's books reflect his income, compare Re Sheinman, (D.C.) 15 F. 2d 323, courts may be confronted with problems requiring a high degree of technical knowledge for their solution. But such problems involve primarily the

> situation of a single taxpayer, and the controlling data can easily be made available to the court. * * *."

And on the merits, that whereasto this controversy is, "allowances for depreciation" "of a single taxpayer", demand reversal so that a proper determination may be had.

Note the definition of the word "may" in *Webster's New International Dictionary*, p. 1517:

> "b. liberty; opportunity; permission; possibility; * * *." "May" is thus defined in 57 *C.J.S.* 457:
>
> "In continuation of the idea previously expressed that 'may' usually is employed as implying permissive or discretional rather than mandatory action or conduct, it has been held that 'may', in its ordinary and primary signification, is a word of permission and is not a word of command. It indicates, imports, or denotes permission; discretion; liberty; liberty to do; privilege; lack of restraint; opportunity. It imports a grant of opportunity or power and is never properly used in a denial, a restriction, or a limitation, except in connection with the word 'not'. * * *."

Compare *Levers* v. *Anderson*, 326 U.S. 219, 90 L.ed. 26.

In accordance with *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 85 L.ed. 1089, Willmut did not elect to seek the administrative determination, but sought to assert its common law right. We are mindful that our case was reviewed in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244; 94 L.ed. 795, wherein it was said:

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Cent. R. Co., 312 U.S. 630, 85 L.ed. 1089, 61 S. Ct. 754. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceas-

ing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. * * *."

With deference, that said by Mr. Justice Reed in his dissent strongly illustrates our position, when, as here, Fly had done that which he ought not to have done—taken that which was not his own—and wherefor the common law *indebitatus assumpsit* is a perfect remedy. Said Mr. Justice Reed, 339 U.S. 246:

"* * * The passage of a federal law creating a forum for the enforcement of certain contract rights connected with commerce does not necessarily withdraw from state courts their recognized jurisdiction over these contract controversies. The purpose to limit enforcement to the federal forum must be found in the federal statute in express words or necessary implication . .

* * *

"The case before us is quite different from Switchmen's Union v. National Mediation Board, 320 U.S. 297, 88 L.ed. 61, 64 S. Ct. 95, and General Committee v. Missouri-Kansas-Texas R. Co., 320 U.S. 323, 88 L.ed. 76, 64 S. Ct. 146. Those concerned controversies of a kind unfamiliar to courts, and they involved the Mediation Board, which could impose sanctions only when the parties agreed to accept its awards. We held that the issues in those cases were not justiciable in the federal courts, since the 'concept of mediation is the antithesis of justiciability.' Here, the controversy relates to the interpretation of contracts, a function courts have always performed, and 'it is not to be lightly assumed that the silence

of the statute bars from the courts an otherwise justiciable issue.'

"Nor did Order of R. Conductors v. Pitney, 326 U.S. 561, 90 L.ed. 318, 66 S. Ct. 322, determine the present jurisdictional issue. In a federal bankruptcy court handling a railroad reorganization, an interpretation of a collective-bargaining agreement was sought. We declared that the federal equity court should 'exercise equitable discretion to give (the National Railroad Adjustment Board) the first opportunity to pass on the issue.' Thus we determined only that under the circumstances of that case the District Court, as a matter of discretion, *should have remanded to the Board a controversy over the meaning of the collective-bargaining agreement, and at the same time should have retained jurisdiction to apply the Board's interpretation to the controversy.* There was no intimation that the obligation to send the controversy to the Board was any more universal than the obligation of an equity court to sometimes remit parties to the state courts for a preliminary decision on state law. There was no ruling that Congress had deprived the District Court of jurisdiction. * * *.

* * *

"When an administrative body varies so markedly from the kind which experience has shown may safely be given final power over people's rights, it should not be assumed that Congress intended the primary jurisdiction of the Board to be exclusive. A more definite expression is required. The decision of the Court places it in a dilemma of its own creation —it must in the future build up a complex system of review, or it must say that Congress intended to leave the rights of many individuals and organizations to the unreviewable discretion of a privately selected board. By giving effect to the plain words of the statute which confer on the Board a jurisdiction only concurrent with the courts, we should avoid the necessity for judicial legislation in unexplored areas

> of the law. If unseemly results should follow, the legislative body would have the facilities to undertake the important and extensive task of deciding what should be the proper distribution of authority between courts and administrative bodies in connection with railroad labor relations. Courts should await specific legislative direction instead of reading into a statute a purpose to transfer jurisdiction from state courts to a federal board."

Note that subsequently said thereasto by this Court in *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553, 3 L.ed. 2d 1422, 1427. And in *Union P.R. Co.* v. *Price*, 360 U.S. 601, 607, 3 L.ed. 2d 1460, 1464, this Court said:

> "* * * We conclude that both issues were decided by the Board against the respondent, and therefore reach the question whether the respondent, despite the adverse determination of the Adjustment Board could pursue the common-law remedy for damages in the District Court."
>
> * * *
>
> "6. Since respondent, instead of bringing his claim in court as was his right under Moore v. Illinois Cent. R. Co., 312 U.S. 630, 85 L.ed. 1089, 61 S. Ct. 754, chose to pursue that claim before the Adjustment Board, he does not even argue that a holding that the Railway Labor Act precludes a relitigation of that claim in the courts would deprive him of any constitutional right to a jury trial."

Moore v. *Illinois Central R. Co.*, 312 U.S. 630, 85 L.ed. 1089, is cited in *Locomotive Engineers* v. *L. & N.R. Co.*, 373 U.S. 33, 10 L.ed. 2d 172, 181; *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 1 L.ed. 2d 972, 982.

4. Willmut, under indebitatus assumpsit, had a discrecretion, not judicially controllable, to sue Fly individually.

When Fly wrongfully individually took, over Willmut's protest, that which was Willmut's, the Constitution gave Willmut thereasto, under the diversity and Federal question statute, a right to judicial review here. Note that the misappropriation by Fly of Willmut's $18,575.08 stands admitted as wrongful, and, therefore, the law, under *indebitatus assumpsit*, conclusively implied a several promise to repay. In Mississippi, where this transaction occurred, Mississippi's court has held that taxes thus unlawfully exacted may be recovered by an action at law. Compare *City of Jackson* v. *Newman*, 59 Miss. 385, 390; *City of Grenada* v. *Andrews*, 214 Miss. 105, 58 So.2d 382, 383; Annotation, "Payment of taxes to prevent closing of, or interference with, business as involuntary so as to permit recovery", 80 *A.L.R. 2d* 1040, 1044.

Note further that under the statutes of Mississippi since 1892 and possibly before, all obligations are joint or joint and several at the election of the obligee. *Mississippi Code of 1892*, Sections 2352 and 2353; *Recompiled Mississippi Code of 1942*, Sections 334 and 335. Therefore, when the party wronged may at his election as a property right sue jointly or severally, the United States may not, pursuant to its alleged sovereignty, make that joint which the law has made several.

Willmut had a personal liability of Fly (whereinto the liability of the United States in no way entered) to sue and recover in virtue of *Chesapeake & Ohio R. Co.* v. *Dixon*, 179 U.S. 131, 45 L.ed. 121; *Powers* v. *Chesapeake & Ohio R. Co.*, 169 U.S. 92, 42 L.ed. 673; *Bentley* v. *Halliburton Oil Well Cementing Co.*, C.A. 5, 174 F.2d 788, accurately reflecting that a plaintiff tortiously wronged by

two may sue (a) jointly or (b) separately, and thereasto the parties sued have no right to make joint that which the plaintiff has made several; especially might not the United States, a sovereign, extend its sovereignty to protect an individual joint tort feasor so that the wronged plaintiff might be bereft of all relief.

The case of *United States* v. *Lee*, 106 U.S. 196, 27 L.ed. 171, has had somewhat of a varied history in this Court, but in *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 93 L.ed. 1628, the history was reviewed and thereasto it was declared, p. 695:

> "* * * A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. * * *."

See also *Malone* v. *Bowdoin*, 369 U.S. 643, 8 L.ed. 2d 168.

Presently the policy of the United States is to admit liability for wrongs done by its agents and to waive its sovereignty under the tort claims act and other statutes.

5. The United States having waived its sovereignty on its own behalf so as to be subject to a direct personal action. Congress did not intend to give to Fly as an individual that which it had abolished as to the sovereign.

As to the individual liability of the United States to a direct action in the District Court as at now, it has waived its sovereignty. Willmut might, with deference, have sued in the District Court directly with full right of review here. The Court of Appeals unconstitutionally destroyed individual responsibility in the District Court. However, Petitioner had made its demand for a refund in accordance with Section 3772, 26 *U.S.C.A.* (1939), and it was accorded the right to so sue expressly both Fly

and the United States. To contend that this permissive statute took away that definitely given, with deference, is such a monumental deprivation of property without due process as to demand rectification here, where alone is rested the power thus to do. We repeat that so sagely said by the Chief Justice in *Flora* v. *United States*, 362 U.S. 145, 157, 4 L.ed. 2d 623:

> "We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws. * * *."

With deference Fly claims under this judgment a complete discharge on the merits for the entire $18,575.08 although upon the face of the pleadings Petitioner is entitled to a judgment therefor. Visualize the ruin wrought when the Court of Appeals said "When you refused to accept the gratuity tendered in an action against the United States in an administrative agency, you discharged the individual liability of your several debtor, Fly." With deference, never could there be a more scandalous perversion of the law.

In *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 260, 86 L.ed. 1455, Mr. Justice Frankfurter said:

> "Nearly a quarter-century ago in Sage v. United States, 250 U.S. 33, 63 L.ed 828, 39 S. Ct. 415, this Court upon full consideration announced the doctrine that the United States is a 'stranger' to a judgment resulting from a suit brought against a collector, and that such a judgment is, therefore, not a bar in a subsequent action upon the same claim against the United States. This was not a novel doctrine. The result was drawn from the conception of a suit against a collector as 'personal', since he was personally responsible for illegally exacting monies under the

> claim that they were due as taxes. Such a 'personal' remedy against the collector, derived from the common-law action of indebitatus assumpsit, has always been part of our fiscal administration. Unless the application given to this remedy by the doctrine of the Sage Case has been displaced by Congress or renounced by later decisions of this Court, the judgment must stand. Concededly Congress has not done so. And although recognition has been made of the technical nature of a suit against a collector, no support can be found for the contention that the Sage doctrine has been discarded as an anachronism. On the contrary, the rule has been reaffirmed in an unbroken line of authority."

Note specifically that this Court therein adjudged the "bar", that a judgment in favor of the United States would not have been *res judicata* in favor of Fly. It adjudged that the United States could have successfully defended itself against Willmut and yet in this suit in the District Court that final judgment was not *res judicata* in favor of Fly. Note that the learned Justice referred to a plea "in bar" and yet here there is naught but a motion to dismiss—a successor to a plea in abatement—for want of jurisdiction. It may be that we have progressed, but under the settled rule of the common law when Fly assumed to delay a valid demand on a dilatory plea of want of jurisdiction, it was a condition precedent to justice that he give to Willmut a better writ. In *Walker v. Hewitt*, 109 Or. 366, 220 Pac. 147, 35 A.L.R. 100, 106, that Court said:

> "* * * 'The criterion or leading distinction between a plea in abatement and a plea in bar is that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with the materials for avoiding the same mistake in another suit in regard to the same cause of action; or, in technical language, it *must give*

plaintiff a better writ.' 1 Chitty, Pl. pp. 462, 463; Settle v. Settle, 10 Humph. 504; Mandel v. Peet, 18 Ark. 236."

Compare *David* v. *David*, 161 Md. 532, 157 Atl. 755, 81 A.L.R. 1100, 1102; 1 *C.J.S.*, Abatement and Revival", Sec. 15, p. 41; 1 *Am. Jur.* "Abatement and Revival", Sec. 70, p. 64.

Assuming, as inherent in a motion to dismiss as a dilatory plea, Fly was obligated to give Petitioner a "better writ", under this obligation Fly would have been compelled to have named the Tax Court, an administrative agency possessing no judicial powers subject to review in this Court. We do protest that the Tax Court is not such a court as to conform to the mandatory requirement of a dilatory plea at law. As Mr. Justice Whittaker said in *Flora* v. *United States*, 362 U.S. 145, 189, 4 L.ed. 2nd 623, 647:

"* * * Taxpayers with larger claims could pursue either their old remedy—which continued to be available and is today—against the Collector in the District Courts or their remedy against the United States in the Court of Claims. * * *."

Note this Court made *res judicata* applicable between these two courts (or agencies) just as set out in *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 67 L.ed. 226; *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 73 L.ed. 918, which would be absolutely impossible unless our argument that this Act is supplementary and not exclusive is adopted. The Court of Appeals, with deference, plowed right through this mandatory interpretation.

So we have the anomaly of, had the United States won a decision against Willmut on the merits and thereafter Willmut had sued Fly in the District Court, the

case was open, and Fly liable unless independently he made a valid defense.

When Willmut has sued Fly with no final judgment against it in favor of the United States, Fly assumes to make a dilatory plea in this Court of competent jurisdiction, the Court of Appeals has held that Fly may defeat on the merits by reason of want of jurisdiction in the District Court. This intolerable situation, with deference, needs rectification, especially when that said by Mr. Justice Frankfurter in *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 86 L.ed. 1455, was not even adverted to. The opinion herein stands, if it be not reversed, as an adjudication that the law is, with deference, that which it never was.

6. Naught contended in the cases cited by the Court of Appeals nor in the cases cited in the Court of Appeals by the learned Assistant Attorney General warrants the wrack wrought unconstitutionally. On the contrary, with deference, each substantially supports or does not controvert Petitioner's position, and convenience of the Court, our differentiation appears in Appendix "T" hereto.

The Court of Appeals did not refer to *May Broadcasting Co.* v. *United States*, 44 A.F.T.R. 1022, relied upon by the Government in the Court of Appeals and noted in a footnote that it had been reversed on other issues, C.A. 8. 200 F.2d 852. In a companion case, *May Broadcasting Co.* v. *Commissioner of Internal Revenue*, C.A. 8. 299 F.2d 84, the Court of Appeals assumed to divide the issues as (1) standard and (2) abnormal, and it seems that in this cause the Court of Appeals reversed the Tax Court and assumed to hold that the Tax Court had jurisdiction not only as to abnormality but also as to the standard issues. In a later case, *Overland Corporation* v. *Commissioner of Internal*

Revenue, C.A. 6, 316 F.2d 777, 782, the Court approved the *May Broadcasting* case, *supra*, and under a parody of reasoning, if a single unit suit were requisite in the Tax Court, it is respectfully submitted that the same might well be true in the Court of Appeals in this Circuit, for as was said in *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 3 L.ed. 2d 1460, by Mr. Justice Douglas, dissenting, 360 U.S. 621:

> "In my view the Court's contrary reading of Sec. 3 raises questions of constitutional magnitude. For if an employee is to be denied any review of the Board's decision when the railroad prevails, while the latter can obtain judicial review with a jury trial before complying with a Board order, there would appear to be an unjustifiable discrimination in violation of the Due Process Clause of the Fifth Amendment. It is not the usual practice in this country to permit one party to a lawsuit two chances to prevail, while the other has only one, nor to permit one party but not the other to get a jury determination of his case. See Pennsylvania R. Co. v. Day, 360 U.S. 548, 554, 3 L.ed. 2d 1422, 1427, 79 S. Ct. 1322 (dissent)."

May Broadcasting Co. v. *Commissioner*, C.A. 8, 299 F.2d 84, was cited in *Commissioner of Internal Revenue* v. *National Bellas Hess*, C.A. 8, 220 F.2d 415, 420; *Maine Steel, Inc.*, v. *United States*, D.C. Maine, 174 F. Supp. 702, 713; *First National Bank of Montgomery* v. *United States*, D.C. Ala., 176 F. Supp. 768, 772; *Roebling Securities Corp.* v. *United States*, D.C., N.J., 176 F. Supp. 844, 848.

Therefore, it is respectfully submitted that the opinion of the Court of Appeals, when it declared:

> "In this case the taxpayer has no election to determine where it will seek relief; Congress has specified an exclusive remedy. * * *"

contravened the Constitution and is without, we respectfully submit, judicial authority, to support it. Frankly, with deference, it disregarded in its entirety the entire law as established by this Court where an individual, as collector, wrongfully extracted and received money under protest. To refuse certiorari would incorporate into the law, as having the implied recognition of this Court, that wherefor this Court has consistently supported, and the unsettling effect of such a discordant declaration cannot presently be foreseen, but should, with deference, be prevented by having the same expunged as not consonant with the Constitution. Possessing an accrued cause of action in *indebitatus assumpsit* against the Collector, Willmut entered the temple of justice through the gate entitled "Article III court" wherein the rights contained in the Constitution are justiciably enforcible and now we are to be cast from the temple for not having entered an annex wherein administrative justice is or is alleged to be, where juries are not, and if the Constitution, *qua* Constitution, is violated, Petitioner is without a right to come here.

If this Court doe not agree with the foregoing, then supplementally:

POINT III.

Can Congress Forfeit Petitioner's Constitutional Right in an Article III Court, Demandable at Common Law, for Not Accepting the Findings of an Executive Agency Wherefrom No Appeal Is, and Whereover This Court Has No Power of Constitutional Rectification When Petitioner Specifically Refused the Tender of the Executive Clemency Alleged to Have Been Existent Therein?

The Court of Appeals as to Petitioner's right to individually recover from Fly, in addition to that covered in Points I and II, specifically declared:

"* * * Congress has provided for a hearing and review in the Tax Court. Due process requires no more. There is no constitutional guaranty of a hearing in an Article III court. * * *."

Herein, Petitioner sued Fly individually in an Article III court on a several liability wherein it possessed a constitutional right to a jury and to a review in this Court. Two members of the Court of Appeals have herein declared that Willmut may not thus do, but must (a) sue the United States, a sovereign, whose consent conditions every action; (b) discharge Fly from that liability constitutionally declared by Mr. Justice Frankfurter and this Court in *United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 260, 86 L.ed. 1455, and the other cases; and (c) compulsorily forego a right under the Seventh Amendment to a jury trial and to a proper appellate review here when it did not accept the proffered charity in the Tax Court. For this surrender of the property against Fly, the United States might compel this course of action (1) without making compensation or (2) for the public use.

While this cause was pending in the Court of Appeals, on June 25, 1962, this Court decided *Glidden* v. *Zdanok*, 370 U.S. 530, 8 L.ed. 2d 671, which was pointedly called to the attention of the Court of Appeals. Therein this Court sharply divided, but, with deference, as to that whereon we herein rely, we find unanimity as to an Article III court. Mr. Justice Harlan said, 370 U.S. 533:

"Article 3, Sec. 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

"'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *.'"

And, finding the decision could not be made on narrow grounds, declared, 370 U.S. 536:

> "The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See O'Donoghue v. United States, 289 U.S. 516, 532-534, 77 L.ed. 1356, 1361, 1362, 53 S. Ct. 740. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation. * * *."

The Court of Appeals assigned to this Section 732(c) such efficacy as that when Willmut sought common law reparation from Fly individually, as of right in the District Court, it forfeited its right to relief; that not having accepted that charity thus tendered to bridge an alleged destruction wrought by enforcing the law as written, Willmut has lost its right under the Constitution to have the statute imposing the tax construed in manner and form as it was written, and, if as so thus construed this statute deprived Willmut of its property without due process and took its private property without compensation, to have that statute in this peculiar aspect declared null and void. In short, Willmut, mindful of its property and the protection under the Constitution, saw fit to stand on its rights under the Constitution as against a charity tendered pretending to relieve by executive pardon. Compare *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 72 L.ed. 985, and *Lynch* v. *United States*, 292 U.S. 571, 78 L.ed. 1434. In short, relying on the Constitution and the necessity of Congress conforming to the Constitution, it did that which those who sought executive clemency had not done, namely, demanded as the law was written it should be enforced. Willmut's demand was for a court wherein the Constitution protected the parties with an appeal therefrom hereto. It, with deference, unless

coerced, will accept naught else. In the *Glidden* case, *supra*, the question was as to the standing of the Judges of the Court of Claims, Judge Madden, and the retired Judge of the Court of Customs and Patent Appeals, Judge Jackson. The Court sustained the action of these Judges in an Article III court when acting therein appropriately by reason of the jurisdiction of their respective courts being such that it did not render their action inapposite, especially when assigned thereto appropriately and when Congress had legislated specifically as to each of these courts. Mr. Justice Harlan thus concluded his opinion. 370 U.S. 584:

> "Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article 3, their judges—including retired judges. Booth v. United States, 291 U.S. 339, 350, 351, 78 L.ed. 836, 840, 54 S. Ct. 379—are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an ex post facto resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the Bakelite and Williams decisions. See, e. g., Judge Madden writing for the Court of Claims in Pope v. United States, 100 Ct. Cl. 375, 53 F. Supp. 570, revd. 323 U.S. 1, 89 L.ed. 3, 65 S. Ct. 16. The factors set out at length in this opinion, which were not considered in the Bakelite and Williams opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.
>
> "That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprive them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should be

given such assignments may be and has been a proper subject for congressional debate, e. g., 62 Cong. Rec. 190-191, 207-209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been devoted to patent, tax, antitrust, or any other specialized field of law in which many eminently well-qualified lawyers are wont to engage. The proposition will not, of course, survive its statement."

How different is the status of the Tax Court, an executive agency, Section 7441, 26 *U.S.C.A.*:

"The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. * * *."

In *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418, 420, 88 L.ed. 138, 142, this Court said:

"The Board is but 'an independent agency in the Executive Branch of the Government', and the legislative pattern of its jurisdiction is clear and unambiguous. The Board is confined to a determination of the amount of deficiency or overpayment for the particular tax year as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment. Internal Revenue Code, Secs. 272, 322(d), 26 U.S.C.A., Secs. 272, 322(d), 6 F.C.A. title 26, Secs. 272, 322(d). It has no power to order a refund or credit should it find that there has been an overpayment in the year in question. United States ex rel. Girard Trust Co. v.

Helvering, 301 U.S. 540, 542, 81 L.ed. 1272, 1276, 57 S. Ct. 855. * * *."

Flora v. *United States*, 357 U.S. 63, 2 L.ed. 2d 1165; *Cutting* v. *United States*, D.C., N.Y., 26 F. Supp. 586; and in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 728, 73 L.ed. 918, 927, this Court said:

> "The truth seems to be that in making provision to render conclusive judgments on petitions for review in the circuit courts of appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper district court. But the apparent conflict in such cases can be easily resolved by the use of the principle of res judicata. If both remedies are pursued, the one in a district court for refund, and the other on a petition for review in the circuit court of appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment. * * *"

Approved in *United States* v. *Price*, 361 U.S. 304, 307, 4 L.ed. 2d 334, 337.

Thus, therefore, when Petitioner had paid the taxes under protest to Fly, as the pleadings now stand is admitted, the merits not having been reached, Petitioner had a cause of action whose definition, so far as Fly was concerned, had been judicially and constitutionally made certain—property. Petitioner's counsel, or some of them, were not and never had been admitted to practice in the Tax Court although the tax consultant, who made the returns, was a member of that Bar. The determination as to the court wherein this suit was to be having been made,

that at issue is, did Petitioner's attorneys make such a faux pas in not selecting the United States as a party defendant and the Tax Court as the court wherein the suit had to be, they forfeited their client's property by malpractice. Let it be noted that before action brought in the District Court, Petitioner was vested with, as to this cause of action, full right of property—to sue in a court therefor—to have a jury thereasto—and to have this Court determine its rights under the Constitution. The first and outstanding question is, so possessing under the Constitution as to this cause of action a right at common law, can Congress, by this act, deprive Petitioner of this right to a jury trial for the recovery of a sum of more than $20 from Fly? The position taken by two members of the Court of Appeals (Judge Cameron did not concur in the opinion) was that notwithstanding the Constitution, the Congress had mandatorily required Petitioner to forego its right in the District Court and to sue only in the Tax Court and to sue not Fly but the United States, a sovereign, who could, as above shown, at any moment withdraw its consent and thereby destroy the cause of action. This suit has been pending nearly ten years and the United States could have waited six years before withdrawing its consent to be thus sued in the Tax Court and had it thus done petitioner would have its property destroyed. It could withdraw its consent right now. Under *Glidden* v. *Zdanok*, 370 U.S. 530, 8 L.ed. 2d 671, and its harmonious predecessors, Willmut possessed the right to an Article III court trial, and Congress could not, as to that thus given in an Article III court, forfeit Petitioner's rights by reason of an offer to allow a redetermination of the tax in the Tax Court. In short, under such a theory, although the Constitution has provided that Petitioner can have a jury, can have a judicial hearing, can have a review in this Court, yet when it sued

in this Court, it can have none of these things because it did not submit to the wrongful coercion and bring its plaint in the Tax Court where it enjoyed not a single one of these privileges.

In *Glidden* v. *Zdanok*, 370 U.S. 530, 599, 600, 602, 8 L.ed. 2d 671, 715, 716, 717, Mr. Justice Douglas said:

> "* * * Article 3 courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and ex post facto laws) are in the body of the Constitution itself. Article 1 courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article 3 courts of law must sit with a jury in suits where the value in controversy exceeds $20, the Court of Claims—an Article 1 court—is not so confined by the Seventh Amendment. The claims which it hears are claims with respect to which the government has agreed to be sued. As the Court said in McElrath v. United States, 102 U.S. 426, 440, 26 L.ed. 189, 192, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules and the procedures to be followed in pursuing claims against the Government. * * *
>
> "The judicial functions exercised by Article 3 courts cannot be performed by Congress nor delegated to agencies under its supervision and control. * * *
>
> * * *
>
> "On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds $20 but there is also the mandate of the Seventh Amendment directing that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.'"

Thereasto unanimity was. Furthermore, in the *Glidden* case, Mr. Justice Harlan expressly said, 270 U.S. 531:

> "In Ex parte Bakelite Corp., 279 U.S. 438, 73 L.ed. 789, 49 S. Ct. 411, and Williams v. United States, 289 U.S. 553, 77 L.ed. 1372, 53 S. Ct. 751, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independence by Article 3 of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article 1. The Congress has since pronounced its disagreement by providing as to each that 'such court is hereby declared to be a court established under Article 3 of the Constitution of the United States.' * * *."

And a specific assignment of the Judges was congressionally authorized and executed. But as to the Tax Court that is so specifically made an Article I court as that, with deference, it would require not judicial legislation, but judicial amendment of the Constitution to make it aught else. It will be noted that Mr. Justice Clark, with whom the Chief Justice concurred, expressly said, 370 U.S. 585:

> "I cannot agree to the unnecessary overruling of Ex parte Bakelite Corp., 279 U.S. 438, 73 L.ed. 789, 49 S. Ct. 411 (1929), and Williams v. United States, 289 U.S. 553, 77 L.ed. 1372, 53 S. Ct. 751 (1933). Both were unanimous opinions by most distinguished Courts, headed in the Bakelite Case by Chief Justice Taft and in Williams by Chief Justice Hughes."

Note further that said as to these cases by Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissenting, 370 U.S. 592:

> "In Williams v. United States, 289 U.S. 553, 77 L.ed. 1372, 53 S. Ct. 751, the Court in a unanimous decision written by Mr. Justice Sutherland held that the Court of Claims, though exercising judicial power,

was an Article 1 court. And in Ex parte Bakelite Corp., 279 U.S. 438, 73 L.ed. 789, 49 S. Ct. 411, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article 1 court. Taft was Chief Justice when Ex parte Bakelite was decided. Hughes was Chief Justice when Williams v. United States was decided. I mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

"Mr. Justice Van Devanter in Ex parte Bakelite marked the line between the Court of Claims and the Court of Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

" 'Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribed, whether it be a fixed period of years or during good behavior.' Id. 279 U.S. at 449."

So that as to the differentiation between an Article III and an Article I court, four members of this Court at that

time declared that these two courts were still Article 1 courts, just as the Tax Court is irrevocably an Article I court, if a court at all; and, with deference, it is submitted that there was unanimity among the seven participating Justices when they reasserted as to Article III courts that they possessed these constitutional rights. The Tax Court by express enactment is but an administrative agency and controlled by principles announced by the Courts presided over by three Chief Justices, Taft, Hughes and Warren. The right to go into the District Court was granted in "all" cases to Petitioner by Section 1332, 28 *U.S.C.A.*, and by Section 1346, 28 *U.S.C.A.*, to sue the United States in "any civil action", so that combining "all" with "any", we propound the Chief Justice's inquiry in *Flora* v. *United States*, 362 U.S. 145, 149, 4 L.ed. 2d 623, 626:

> "* * * But it is argued that this reading of the statute is foreclosed by the presence in Sec. 1346(a)(1) of the phrase 'any sum.' This contention appears to be based upon the notion that 'any sum' is a catch-all which confers jurisdiction to adjudicate suits for refund of part of a tax. A catchall the phrase surely is; but to say this is not to define what it catches. * * * *."

Furthermore, with deference, administrative agencies are by some well-questioned. Compare "Administrative Proceedings: Their Time and Cost Can Be Cut Down", by Edward V. Long, *American Bar Journal*, Vol. 49, No. 9, September, 1963. With deference, among those so questioning is the writer of this segment and being entrusted with the institution of this action, entered the District Court—an Article III court. When it was suggested that the right to file a petition in the Tax Court co-existed, the right thus to do was questioned generally and especially because the Commissioner's letter was in this form:

"In accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code this notice of disallowance in full of your claim or claims is hereby given by registered mail.

"By direction of the Commissioner."

Section 732(c) is the sole ground invoked by the Government, by the District Court and by the Court of Appeals for declining jurisdiction in this cause. If that Section is applicable at all, which Willmut denies, it comes to life only when a question must be settled solely by reference to Section 711(b) (II) (H) (I) (J) or Section 721 or Section 722. It is accepted by the parties that Sections 721 and 722 are not involved. It becomes necessary then to determine whether the suit by Willmut must be determined solely by reference to Section 711(b) (II) (H) (I) (J).

The only way the Court can decide whether such reference is thus essentially determinable is to examine the section and examine the facts. The stipulation (R. 30) gives the facts on which Willmut intended to rely in chief. Casual reading of that stipulation immediately raises the question of whether the suit must be determined solely by reference to Section 711(b) (II) (H) (I) (J) or may be fully determined by reference to the abandonment and loss of useful value provisions of 711(b) (I) (E).

It follows, then, that if the cause may be determined by reference to (E), it would not be determinable solely by reference of (H) (I) (J); thus the very nature of the cause demonstrates that Section 732(c) is not authority for denial of jurisdiction here if, indeed, it would be basis under any circumstances between the parties.

Section 3772(a) (2) stated in the claim denial to be basis for the denial of claim, on its face recognized jurisdiction of any Court which may entertain a lawsuit of any kind. It is already shown herein that the United States Court of Claims and the United States District Courts are those having jurisdiction of matters arising under the Internal Revenue laws of the United States where the amount involved was $3,000 (for District Courts at the time of filing this suit).

Fundamentally, the question presented by invoking the provision of Section 732(c) is not that of jurisdiction but, under these circumstances, may be relied upon solely to determine whether dismissal of the complaint should follow a hearing on the facts; however, either for jurisdiction or dismissal for failure to state a claim grantable, the Court must examine the cause in its search for basis to do either.

In *Sperry* v. *Florida*, 373 U.S. 379, 10 L.ed. 2d 428, this Court had under discussion a cognate question as to how far those who appeared before the administrative agencies could practice law. Under this decision, admission by the Tax Court would constitute a condition. The writer in advising the court wherein this action was filed, with deference, followed the interpretation thereasto given by this Court in the cases collated in Point II and likewise those upon which *Glidden* v. *Zdanok*, 370 U.S. 530, 8 L.ed. 2d 671, was based. The client, under advice of counsel, did not desire to obtain a ruling by an administrative agency, but to have a judicial decision based upon its rights under the Constitution with an appeal to this Court. The opinion of the Court of Appeals is so positive, with deference, as to connote substantially malpractice on the part of some of us in entering the District Court, but in thus doing, with the utmost deference, the entry was made

in accordance with the Constitution and the determinations of this Court thereasto. If, with deference, the opinion of the Court of Appeals continues to stand, it will be inconsistent with the decisions of this Court and, with deference, of substantially every Circuit except the Fifth. The evils portended by the requirement of the two members of the Court of Appeals that Petitioner forego its right to elect as a citizen and be compelled to act as a subject, just as if this were a police state, is that whereasagainst Petitioner's main objection is; but basically that Court's ruling as to the statute goes profoundly deeper and does not meet the requirement of the Constitution as phrased by Mr. Justice Story when he declared in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 702, 4 L.ed. 629, 675:

> "* * * This question cannot be answered in the affirmative until it is established, that the legislature may lawfully take the property of A and give it to B; * * *."

The judicial power under the Constitution may not so torture a "may" right into a "must" right, and compel suit against the sovereign when the plaintiff elected to sue (may we say, if this be successful) a subject.

POINT IV.

Appropriate Judgment Here.

Jurisdiction alone having been considered and determined, the reversal should be for a consideration of the merits. The District Judge sustained the motion to dismiss and in concluding his opinion, specifically said, R. 38:

> "* * * The merits of this case are not reached and the judgment to be entered here will not reflect any views on the merits of this case. It is my opinion that this Court is without jurisdiction and that

the motion of the Defendant to dismiss this suit ought to be sustained. * * *."

The Court of Appeals, in its opinion affirming, declared, R. 53:

> "In this case the taxpayer has no election to determine where it will seek relief; Congress has specified an exclusive remedy. Congress has provided for a hearing and review in the Tax Court. Due process requires no more. There is no constitutional guaranty of a hearing in an Article III court. * * *."

Thus the basic error being as to the jurisdiction, the rule controlling is found in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249, 95 L.ed. 912, 917, wherein Mr. Justice Jackson reversed the lower court, thereasto saying:

> "* * * The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, then mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, '* * * if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.' The Fair v. Kohler Die & S. Co., 228 U.S. 22, 25, 57 L.ed. 716, 717, 33 S. Ct. 410. See also Hurn v. Oursler, 289 U.S. 238, 240, 77 L.ed. 1148, 1150, 53 S. Ct. 586. Even a patently frivolous complaint might be sufficient to confer power to make a final decision as res judicata on the parties.

"* * * We think there was power in the District Court to decide whether the claims so grounded constitute a cause of action maintainable in federal court, and, if so, whether it is sustained on the facts. We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent."

In the case of *Baker* v. *Carr*, 369 U.S. 186, 7 L.ed. 2d 663, our point is amply sustained. There the motion to dismiss was, p. 196:

"* * * '(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted. * * *'"

The District Court dismissed. This Court said, 369 U.S. 199:

"Article III, Sec. 2 of the Federal Constitution provides that 'the judicial Power *shall* extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *.' It is clear that the cause of action is one which 'arises under' the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit,' Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579, 48 L.ed. 795, 801, 24 S. Ct. 553 or 'frivolous,' Bell v. Hood, 327 U.S. 678, 683, 90 L.ed. 939, 943, 66 S. Ct. 773, 13 A.L.R. 2d 383. That the claim is unsubstantial must be 'very plain.' Hart v. B. F. Keith Vaudeville Exch., 262 U.S. 271, 274, 67 L.ed. 977, 979, 43 S. Ct. 540. Since the District Court obviously and correctly did not deem the as-

serted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter. And of course no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. * * *.

"Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, Sec. 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U.S.C., Sec. 1343 (3):

" 'The district courts *shall have* original jurisdiction of any civil action authorized by law to be commenced by any person * * * to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of *any* right, privilege or immunity secured by the Constitution of the United States. * * *.' "

Relied on in *Scholle* v. *Hare*, 369 U.S. 429, 8 L.ed. 2d 1, 2; and in *W.M.C.A.* v. *Simon*, 370 U.S. 190, 191, 8 L.ed. 2d 430, 431, this Court said:

"* * * As in Scholle v. Hare, 369 U.S. 429, 8 L.ed. 2d 1, 82 S. Ct. 910, we believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination. The judgment is vacated and the case is remanded for further consideration in the light of Baker v. Carr, (U.S.) supra."

If the record be looked to, it was specifically stipulated, p. 34:

> "10. Should it be determined that the plaintiff is entitled to a recovery in this action, said recovery shall be computed by the Internal Revenue Service. If the parties are unable to agree to this computation the matter may be brought before the Court for a determination."

With deference, the power of this Court to direct the District Court to make appropriate reference to another tribunal for administrative relief, if essential, is suggested. Compare *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* 341 U.S. 246, 95 L.ed. 912, opinion Mr. Justice Jackson, dissenting opinion Mr. Justice Frankfurter; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 94 L.ed. 755, dissenting opinion Mr. Justice Reed.

CONCLUSION

WHEREFORE, for that so thus, with deference, wrongfully and unconstitutionally adjudged in this cause by the two members of the Court of Appeals, it is requisite that the alleged exclusive remedy should be restored to a permissive right; and further that the individual right of a wronged taxpayer against a government agent, unlawfully collecting, should be reasserted and Petitioner not bereft of its constitutional right by being compelled to sue in an administrative agency where the Constitution may not be lawfully construed—the taxpayer being coerced in its constitutional rights; and further the taxpayer having a right in an Article III court to assert against an individual wrongdoer responsible for trespass may not be therein cast for not suing the United States in an Article I court where a jury trial is not, and the Constitution may not be appealed to by

reason of a requirement that its benefits be foregone before the taxpayer is admitted as a suppliant.

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